In The United States Circuit Court of Appeals

for the Ninth Circuit

C. A. SMITH LUMBER MANUFACTURING COMPANY,
a Corporation,
Plaintiff in Error

v.

JOHN A. PARKER,
Defendant in Error,

Upon Writ of Error to the United States District Court for the District of Oregon.

Petition for Re-Hearing

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PACIFIC BANKER

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PETITION FOR RE-HEARING BY DEFENDANT IN ERROR.

The defendant in error respectfully petitions the court for a re-hearing of this cause on the following ground:

The court erred in its decision in not considering the statute of Oregon (Sec. 713, L. O. L.) upon which this case turned, and the construction given that statute by the Supreme Court of the State of Oregon, and rendering the decision herein contrary thereto.

The opinion of the court discloses that the court gave no consideration to either the statute of Oregon *upon which the case necessarily turns or to the construction given to that statute by the Supreme Court of Oregon.*

That the case turns upon a statute is apparent from the opinion of Judge Bean on the demurrer (p. 29, Transcript) and from the defendant's answer. Paragraph VIII of defendant's answer (p. 35, Transcript) is in part as follows: "and that the plaintiff is forbidden by the laws of the State of Oregon, and especially by Section 713, L. O. L., to vary the terms of said written agreement."

Section 713, L. O. L., reads as follows:

> "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:
>
> " * * *
>
> "2. * * * But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section 717, * * *."

And Section 717, L. O. L., to which the last section refers, is as follows:

> "For the proper construction of an instrument, the circumstances under which it was

made, including the situation of the subject of the instrument, and of the parties to it, may also be shown so that the judge be placed in the position of those whose language he is to interpret."

Although the statute of Oregon is little more than a crystallization of what had been the law prior thereto, yet *it is still a statute* and a construction of it by the Supreme Court of the state binds the Federal Court in all cases arising under the statute within the state. That statute was construed by the Supreme Court of Oregon in the case of *Holmboe v. Morgan*, 69 Ore. 395, points 2 and 3, p. 400; from which we quote:

"The order for the machine was in writing and signed by defendants Morgan and Howard, and the rule is that the terms of the writing cannot be varied by parol evidence; *but where the contract is not one required by the statute of frauds to be in writing, this rule is not violated by admitting evidence to establish the parts of the contract not contained in the writing. American Contract Co. v. Bullen Bridge Co.*, 29 Ore. 549, (46 Pac. 138); *Williams v. Mt. Hood Ry. & Power Co.*, 57 Ore. 251 (110 Pac. 490, 111 Pac. 17, Ann. Cas. 1913-A, 177.)."

"3. The evidence establishes that Morgan was to be taught to operate the machine. This was testified to by Morgan and admitted by Dunbar, and Mr. Johnson, the manager of Howard's auto business, testified that, when a sale of a car is made, there is involved, although not specified in the order for the machine, a demonstration of the car and the making of the buyer

acquainted with it. This establishes the authority of the salesman to contract therefor. Although the instructions given were compensated by the agent's commission, yet it was a part of the contract of sale and to be furnished by the dealer, and, not being mentioned in the order for the machine, may be proved by parol. There was no error in admitting such proof. This decision disposes also of assignment No. 5."

(The italics are ours.)

Judge Bean took a similar view in his decision, as he cited the *Holmboe v. Morgan* case in his opinion. (See page 31, Transcript.)

And that the Oregon court does not stand alone in its construction of that statute is apparent from *Julliard v. Chaffee*, 92 N. Y. 535, where it was said:

"A party sued by his promisee, is always permitted to show a want or failure of consideration for the promise relied upon, and so he may prove by parol that the instrument itself was delivered even to the payee to take effect only on the happening of some future event (*Seymour v. Cowing*, 1 Keyes, 532; *Benton v. Martin*, 52 N. Y. 570; *Eastman v. Shaw*, 65 Id. 522), or that its design and object were different from what its language, if alone considered, would indicate. (*Denton v. Peters*, L. R. 5 Q. B. 474; *Blossom v. Griffin*, 3 Kern. 569; *Hutchins v. Hebbard*, 34 N. Y. 24; *Seymour v. Cowing, supra; Barker v. Bradley*, 42 N. Y. 316; 1 Am. Rep. 521; *Grierson v. Mason*, 60 N. Y. 394; *De Lavalette v. Wendt*, 75 Id. 579; 31 Am. Rep. 494.) He may also show that the instrument relied upon was executed in part performance only of

> *an entire oral agreement* (*Chapin v. Dobson*, 78 N. Y. 74; 34 Am. Rep. 512), or that the obligation of the instrument has been discharged by the execution of a parol agreement collateral thereto (*Crossman v. Fuller*, 17 Pick. 171), or *he may set up any agreement in regard to the note which makes its enforcement inequitable.*" (Italics are ours.)

Jones on Evidence (pocket edition of April, 1912), Sec. 440, states the rule thus: "If the contract is one *required by law to be in writing, it must be complete in itself*," citing many cases in support of the text.

Certainly, this court is bound by the decision of the State Supreme Court construing a state statute and we respectfully urge that we are entitled to have the points raised by this petition definitely decided. Because, if this court shall refuse to follow the decision of the Supreme Court of the state in construing a statute, we will, under the decisions, be entitled to *certiorari* from the Supreme Court. And therefore, we earnestly petition this court (a) for a rehearing of this cause, and (b) that the court pass upon the question raised in our brief and decided by the lower court and raised by the plaintiff in error's answer.

Respectfully submitted,

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